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No.

in the
Supreme Court
of the
United States

OCTOBER TERM, 1983

HOWARD HERRING

vs.

THE STATE OF FLORIDA

**PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
OF FLORIDA. THIRD DISTRICT**

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Suite 300
North Miami Beach, Florida 33162
Counsel for Petitioner

QUESTION PRESENTED

Whether the warrantless seizure and search of a carryall from the petitioner's vehicle parked in his driveway exceeded Fourth Amendment boundaries, where probable cause existed only for the seizure of a weapon in plain view?

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PETITION FOR WRIT OF CERTIORARI
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OF FLORIDA, THIRD DISTRICT

The Petitioner, HOWARD HERRING, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the District Court of Appeal of Florida, Third District entered in this proceeding on July 15, 1983.

OPINION BELOW

The opinion of the Third District Court of Appeal of Florida, not yet reported, appears in the Appendix hereto. No opinion was rendered by the trial court, The Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida.

JURISDICTION

The judgment of the District Court of Appeal of Florida Third District was entered July 5 1983. A timely motion for rehearing was denied on August 24 1983 and thus petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. S 1257(3).

STATEMENT OF THE CASE

Petitioner was charged by information with eight counts as follows:

- I. Aggravated assault by automobile.
- II. Aggravated assault with a pistol.
- III. Aggravated assault with a pistol.
- IV. Unlawful possession of a firearm while engaged in a criminal offense.
- V. Possession of a firearm by a convicted felon.
- VI. Leaving the scene of an accident by a convicted felon.
- VII. Possession of a controlled substance, cocaine.
- VIII. and, Possession in excess of 25 grams of a controlled substance, cocaine.

Motions to suppress the controlled substance, a 22 calibre Colt automatic pistol and confessions and admissions were filed and denied.

Jury trial was held on August 3rd, 4th and 5th, 1981. The trial court, at the close of all the evidence granted a judgment of acquittal as to Count I of the information.

The jury returned the following verdicts:

As to Count II; guilty of simple assault, a lesser included offense.

As to Count III; guilty of simple assault, a lesser included offense.

As to Count IV; guilty.

As to Count V; guilty.

As to Count VI; guilty.

As to Count VII; guilty.

As to Count VIII; guilty.

The petitioner was sentenced to thirty (30) years with regard to Count VIII, a suspended sentence with regard to Count VII, One (1) year with regard to Count VI, Fifteen (15) years with regard to Count V, a suspended sentence with regard to Count IV, Sixty (60) days with regard to Counts III and II; all sentences to run consecutively. The trial court invoked the three year mandatory minimum provision as to Count VIII and added a Fifty Thousand (\$50,000.00) dollar fine.

On appeal to the District Court of Appeal of Florida, Third District, Counts IV and VI were reversed and the convictions and sentences vacated. The balance of petitioner's convictions were affirmed. This petition for Writ of Certiorari in the United States Supreme Court follows.

STATEMENT OF THE FACTS

The search and seizure issues presented by this petition are raised by the facts presented to the trial court by Lu Anne Williams, police officer with the City of Hialeah Police Department at the suppression hearing and at trial.

Officer Williams was advised over the radio that there was an accident and in connection therewith one of the persons involved in the accident was pointing a gun at others involved. Apparently, the person who had the gun left the scene. Officer Williams was given the tag number of the light blue Thunderbird that left the scene. A further dispatch advised that the vehicle was registered to the petitioner and where the petitioner lived.

Officer Williams went to petitioner's home and saw the light colored two-door Thunderbird alongside the driveway that lead to the petitioner's house. The petitioner was standing near the vehicle and the two doors, the drivers and the passengers, were open. The petitioner was walking to his house with another Hialeah police officer.

Officer Williams parked her vehicle and stopped to examine petitioner's Thunderbird before going to the house. The doors were open and the interior lights were on. She observed a black carryall with two handles laying in the center of the Thunderbird's back seat.

Officer Williams noticed a brown suede zippered gun case inside the black carryall. She recognized it as

being a gun case. Further she saw the butt end of an automatic weapon in the brown gun case. The gun case was visible to Officer Williams who viewed it from outside the car. She picked up the black carryall with everything in it and removed it from the back seat of petitioner's vehicle. While she was doing this a green zippered vinyl bag fell out of the black carryall to the ground. She then placed the black carryall containing the brown gun case in her police car and locked the door pending further investigation.

While she was carrying the black carryall from petitioner's Thunderbird to the police vehicle Officer Williams noticed sticking out of a zippered compartment a ziploc bag with white powder in it. She believed it to be cocaine. She did not remove the ziploc bag from the carryall at that time, but locked it in her car with the carryall.

Officer Williams then went to petitioner's house. She waited there until the witnesses from the accident arrived. She returned to her police vehicle and retrieved the gun from the carryall for the purpose of having the witnesses identify it. After this she removed the ziploc bag from the carryall. She observed three smaller sandwich like bags packed down in the bottom of the larger bag. There was also a heat sealed package which also contained a white powder. It is clear that Officer Williams first saw the white powder and the ziploc bag right after she removed the carryall from petitioner's car.

Officer Williams went back to petitioner's car a second time and retrieved the green bag that fell out of the black carryall.

Officer Williams' reason for seizing the carryall was that the edge of the carryall was closer to her than the gun case. There was other luggage and hand bags in the Thunderbird but they were not seized or searched.

The petitioner was arrested shortly after the search of his vehicle. It should be noted that there were two passengers in petitioner's vehicle during the accident and they were in his home at the time of the arrest.

ARGUMENT

The scope of the search and seizure of the black carryall which was removed from petitioner's vehicle without probable cause was unreasonable and violative of the Fourth Amendment to the Constitution.

In *United States v. Ross*, 456 U.S. 798 (1982) this Court limited the "Carroll Doctrine" to those cases in which searches of vehicles are supported by probable cause,

"In this class of cases, a search is not unreasonable if based on facts that would justify the issuance of a warrant even though a warrant has not actually been obtained." 456 U.S. at 809

The search and seizure in the case at bar is further limited by *Coolidge v. New Hampshire*, 403 U.S.443 (1971) under facts almost on "all fours" with the instant case. In *Coolidge, supra*, arrest was made inside the house and the seizure of the vehicle outside the house in the driveway where the vehicle was parked. *Coolidge*,

supra, rejected the Carroll Doctrine rationale under these circumstances. As in *Cooledge, supra*, there was no way in which petitioner could conceivably enter his car and drive it away after the police arrived on his property, *Cooledge, supra*, 403 U.S. at 460.

In the case at bar it is conceded that the police had probable cause to search for and seize a weapon for they received information that someone in petitioner's car had assaulted two victims with a firearm. When Officer Williams approached the petitioner's car she observed in plain view a gun case contained in a carryall. *Robbins v. California*, 453 U.S. 420, 427 (1981); *Arkansas v. Sanders*, 442 U.S. 753 (1979).

It is clear that the gun case could not have been seized under the exception of a search incident to an arrest *Cooledge v. New Hampshire, supra*; *Chimel v. California* 395 U.S. 752 (1969); *Preston v. United States*, 376 U.S. 364 (1964). The test articulated in *Chimel, supra*, to determine whether the scope of a warrantless search and seizure exceeded constitutional bounds is to determine whether the area searched at the time of the search was conceivably accessible to the arrestee — assuming that he was neither “an acrobat (nor) a Houdini.”

Thus, the seizure of the gun case without more than probable cause in the instant case will only be upheld because some containers by their very nature cannot support any expectations of privacy. The contents of a gun case can be inferred from its outward appearance. *Robbins, supra Sanders, supra*; *Ensor v. State*, 403 So.2d 349 (Fla. 1981).

The seizure of the gun case from within the carryall while reposed on the back seat of petitioner's car would have assured the police of safety since the petitioner was about to be arrested in his house and the vehicle was not an area within which the petitioner might reach in order to obtain a weapon. *Michigan v. Long*, ____ U.S. ____ 33 CrL 3317, (decided July 6, 1983.)

It is submitted that once the police removed or could have removed the gun case, the basis of the entire probable cause for a warrantless search and seizure, was also removed. There was no exigent circumstances that would have prevented the police from securing a search warrant from a magistrate. There was no danger of flight or escape, no danger of harm to the police officers or the general public, and no risk of loss, destruction, removal or concealment of evidence. *Coolidge, supra, Sanders, supra*. The petitioner was to be arrested and would not have re-entered the vehicle. The seizure of the carryall and subsequent search was clearly beyond the pale demonstrated by *Chimel, supra; United States v. Chadwick*, 433 U.S. 1 (1977). Certainly, the respondents cannot claim an inventory search where petitioner's vehicle was not impounded. The other luggage contained therein was not seized and the vehicle was parked in his driveway. *South Dakota v. Opperman*, 428 U.S. 364 (1976).

The scope of a warrantless search does not include rummaging through locked drawers or closets or luggage or carryalls or seizing articles to search at another time or place. *James v. Louisiana*, 382 U.S. 36 (1965); *Stoner v. California*, 376 U.S. 483 (1964); *Preston, supra*. This is especially true since Officer Williams had no

probable cause to remove the carryall since she had already found the gun.

It is respectfully submitted that the District Court of Appeal of Florida, Third District, erred in affirming the search. It must be inferred from its decision and opinion that it has misinterpreted *Ross, supra* and applied its principles to a non Carroll fact situation. By doing so, the state court has effectively overruled decisions of this court and extended the scope of a warrantless search and seizure beyond reasonable constitutional guidelines. This court should grant this Petition for Writ of Certiorari to delineate the scope of warrantless automobile searches and seizures in non-Carroll situations. The authorities shoulder a heavy burden for failure to obtain a warrant for further search and seizure after all exigencies have been eliminated. Here, the weapon was found and impounded.

Although the District Court of Appeal of Florida, Third District, did not write an opinion as to its review of the denial of the motion to suppress, it is submitted that its affirmance was based upon an erroneous interpretation of *Ross, supra*, and not on adequate and independent state grounds. *Michigan v. Long, supra*.

CONCLUSION

For the above reasons and the citation of authorities set forth herein, it is respectfully urged that this Honorable Court grant its Writ of Certiorari and enter its order quashing the decision hereby sought to be reviewed and grant such other and further relief as seems right and appropriate to this court.

Respectfully Submitted,

A handwritten signature in dark ink, appearing to read "Harold Mendelow", is written over a horizontal line.

HAROLD MENDELOW

Attorney for Petitioner

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North Miami Beach, Florida 33162
(305) 944-9100

Appendix

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A. D. 1983

HOWARD HERRING,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Opinion filed July 5, 1983.

An appeal from the Circuit Court for Dade County,
Maria M. Korvick, Judge.

Harold Mendelow, for appellant.

Jim Smith, Attorney General, and Paul Mendelson,
Assistant Attorney General, for appellee.

Before SCHWARTZ, C. J., and BARKDULL and
JORGENSEN, JJ.

JORGENSEN, Judge.

Howard Herring was charged in a multi-count
information and found guilty by a jury of several criminal
violations. We affirm the trial court judgments and
sentences entered on the jury verdicts with two
exceptions and remand for further proceedings.

The state has conceded that *Redondo v. State*, 403 So.2d 954 (Fla. 1981), controls Count IV of the information and the trial court is therefore directed to vacate the conviction and sentence entered upon Count IV. See *Thomas v. State*, 430 So.2d 617 (Fla. 2d DCA 1983).

As for Count VI, section 316.027(2), Florida Statutes (1979), is violated if the *driver* of a vehicle involved in a traffic *accident* resulting in *injury or death* willfully fails to remain at the scene of the accident until the requirements of section 316.062, Florida Statutes (1979), are fulfilled. See *State v. Murray*, 425 So.2d 661 (Fla. 4th DCA 1983); §§ 316.027(1), (2), 316.062, Fla. Stat. (1979).

It is apparent that the purpose of sections 316.027 and 316.062 is to assure that any injured person is rendered aid and that all pertinent information concerning insurance and names of those involved in the traffic accident is exchanged by the parties.

At the time of the injury the "accident" in which Herring was involved was already a *fait accompli* and no injury resulted therefrom. Sections 316.027 and 316.062 were therefore not implicated. Any injury which resulted occurred *after* Herring's vehicle had struck the other vehicle and the other vehicle had been stopped. It was the driver of the other vehicle's act of restarting his vehicle that caused the injury to the passenger of that vehicle. This was an "accident" to which Herring was

not a party. The trial court is therefore directed to vacate the conviction and sentence entered upon Count VI of the information.

Affirmed in part, reversed in part and remanded with directions.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

JULY TERM, A.D. 1983

WEDNESDAY, AUGUST 24, 1983

CASE NO. 81-2110

HOWARD HERRING,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

Upon consideration, appellant's motion for rehearing
is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE
Clerk District Court of
Appeal, Third District

By Evelyn A. Hillman

Deputy Clerk

cc: Harold Mendelow
Paul Mendelson

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA.

CRIMINAL DIVISION

No. 79-8740A

THE STATE OF FLORIDA,

Plaintiff,

vs.

HOWARD HERRING,

Defendant.

Metropolitan Justice Building,
Miami, Florida,
Monday, 3:30 p.m.,
February 23, 1981.

The above-entitled case came on for hearing before
The Honorable Mario P. Goderich, Circuit Judge, in
open court, pursuant to notice.

APPEARANCES:

JANET RENO, State Attorney, by
WILLIAM RITCHIE, Assistant State Attorney,
Attorney for Plaintiff.

SOLOMON & MENDELOW, by
HAROLD MENDELOW, Esq., of counsel
Attorneys for Defendant.

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THE COURT: Why do you not get your next witness, Counsel?

Thereupon:

LU ANNE WILLIAMS

was called as a witness on behalf of the State and, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SIEGEL:

Q. Could you state your name and occupation, please.

A. Lu Anne Williams, police officer with the City of Hialeah Police Department.

Q. How long have you been so employed?

A. Two and a half years.

Q. Were you so employed on September 22, 1980?

A. Yes, I was

Q. On that date, what was your assignment?

A. I was assigned in the detective squad. I was riding in uniform in an unmarked police car assisting patrol.

Q. On that day, did you have an occasion to become involved in an investigation which later resulted in the arrest of a Howard Herring?

A. Yes, I did.

Q. Do you see Mr. Herring in court?

A. Yes, I do.

Q. Would you point him out.

A. Sitting in the denim jacket [indicating].

THE COURT: Indicating the probationer, Howard Herring.

Q. [By Mr. Siegel] How did you first become involved in this case?

A. I was riding on Red Road and approximately 40th Street when Officer Duarte advised over the air that a passing motorist had seen an accident or something involved with an accident and that one of the people involved in the accident, an older man, had a gun and was pointing it at the other people involved in the accident.

Q. After you heard that radio broadcast, what did you do?

A. Proceeded north on Red Road to the location, at approximately 53rd Street.

Q. Did you go to the site where the gun pointing occurred?

A. I drove past it. Officer Polink and I believe Officer Fernandez—I'm not sure of the second officer—had already arrived at the accident scene, so I began to search the area for the vehicle.

Q. What vehicle were you searching for and how did you know for what vehicle to search?

A. One of the officers—I believe it was Polink, but I'm not sure—advised on the air that we were looking for a light-colored, light blue Ford Thunderbird.

The tag number on the vehicle was, I believe ESG-246.

Q. After you heard that information, what did you do?

A. I began looking up and down the streets in that area for the vehicle.

Q. Did you find anything of a—

A. Not exactly at the scene, no.

Q. Did there come a time shortly thereafter when you heard some further information concerning the identity of the person for whom you were looking?

A. Yes. The dispatcher advised that they had run the tag via the computers and that that tag was

registered to a vehicle, a Ford two-door, and that that vehicle was registered to Mr. Herring, and the address, I believe, was 2674 West 9th Court.

Q. After you received that information concerning the identity of the person for whom you were looking, what did you next do?

A. Officer Fernandez advised that he was going down to that address to check and see if the vehicle was there, and I got on our technical channel and asked him if he wanted a backup.

Q. Did he in fact indicate that he wanted a backup?

A. Yes, just in case.

Q. Did you go to that location?

A. Yes, I did.

Q. When you got to that location, did you see a car there at the address?

A. Yes.

Q. Describe what car you saw and where you saw the car.

A. I saw a late model light blue Thunderbird two-door. The tag number, of course, corresponded exactly with the tag number that we had been given on the air and it was pulled up facing the house.

Q. Was it in the driveway?

A. I don't know if it was in a driveway of just off of a driveway, but was facing alongside a driveway.

Q. How far from the house was the car?

A. The front of the car, maybe thirty feet.

Q. Did the driveway that the car was on or off of lead to any other house or —

A. I believe the driveway led to a garage. I'm not sure. I didn't check the house. It appeared to be.

Q. Was the garage affixed to one house?

A. It was all one structure, yes.

Q. What did you observe about the car when you first arrived?

A. I pulled in along just north of the house on the parking because I saw, just as I pulled up, the defendant standing — the driver's door was open and he was standing or just stood up.

I saw his head raise up so that I could see his head over the top of the car. He was on the other side of the car from me.

The door was open on the driver's side of the car. The passenger side of the car was open or passenger door was also open.

Q. Did you eventually go in the house with Officer Fernandez with the defendant?

A. Yes, I did.

Q. After you went inside of the house, did you go back outside of the house towards the car?

A. I approached the vehicle before going into the house.

Q. Did you look inside of the car?

A. Yes, I did.

Q. Were the interior lights on or off inside of the car?

A. Interior light was on. Doors were open.

Q. Did you notice anything inside of the car?

A. Yes, I did.

Q. What did you notice?

A. There was a black carryall which zips across the top with, I believe, two handles. It was laying in the center of the back seat.

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Q. In order to see this carryall bag, did you have to open the doors, move anything or anything else of that nature?

A. I was approximately two to three feet away from the car. I saw it from the passenger side. The passenger door was open and I was walking up towards the passenger door with a clear view into the car with the bag in it like that [demonstrating].

Q. You did not have to open any doors or anything else in order to see it?

A. No. Completely plain and unobstructed view.

Q. When you looked to the carryall bag, did you notice anything inside of the carryall bag?

A. Yes.

Q. What did you notice inside of the carryall bag?

A. I believe it was a brown suede zippered gun case. They're triangular in shape.

Q. How did you know it was a gun case?

A. From experience. I've never seen anything else that resembles it that's not a gun case.

Q. Have you ever seen anything like that before which was not a gun case or never possessed a gun?

A. No, never anything at all like that.

MR. SIEGEL: Mark that as a composite exhibit, please.

THE CLERK: State's Exhibit 1-A Composite on the [89] hearing.

[Thereupon, the item referred to was marked State's Composite Exhibit 1-A for identification.]

Q. [By Mr. Siegel] Officer Williams, let me show you what has been marked as State's Composite Exhibit 1-A for identification and ask you if you recognize, first of all, this brown leather bag inside of it?

A. Yes, I do.

Q. What do you recognize that as being and where did you see that before?

A. That is a gun case and I recognize it as being the gun case I saw that night.

Q. Did you ultimately seize the carryall bag?

I will get back to how you did, but did you ultimately seize it?

A. Yes.

Q. Ultimately seized this brown suede bag?

A. Yes.

Q. Did you open up the brown suede bag?

A. It was already partially open.

Q. Did you see anything inside?

A. Yes, the butt end of and automatic weapon.

Q. Did you pull out the gun?

A. Eventually, yes.

Q. Do you recognize this gun that is contained in [90] State's Exhibit 1-A?

A. Yes. That is the gun that was inside this bag.

Q. That you seized?

A. Yes.

MR. SIEGEL: Just for clarity's sake, I would move to introduce State's Composite Exhibit 1-A for identification as State's Exhibit 1.

THE COURT: Mr. Snowden?

MR. SNOWDEN: Judge, I have no objection subject, of course, to the pending motion.

THE COURT: The motion. All right.

Let us put it in.

THE CLERK: Change it now to State's Exhibit No. 1 Composite.

[Thereupon, the item referred to was marked State's Composite Exhibit No. 1 and received in evidence.]

Q. [By Mr. Siegel] Let us backtrack a little bit. Describe the carryall bag that you saw State's Exhibit 1 contained in.

A. All right. It was black. I believe it was a—it zippers across the top.

On the sides of it, it had one side with two zippered pockets.

I believe there's a pocket on the other side. I'm not sure.

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It has handles where you pick it up. It sits more like this [demonstrating].

Q. When you looked at that carryall bag, how was this brown suede gun case situated inside of that bag?

A. All right. The bag was open.

If this is the bag sitting here [demonstrating] and it opens across the top this way [indicating]—

Q. How does it open—by a zipper?

A. Via zipper.

Q. Was the zipper all the way unzipped?

A. Yes, all the way unzipped.

This gun case with the gun in it was set in it like this [indicating] so that this part of the gun case [indicating]—

MR. SIEGEL: Indicating the narrower end of the gun case.

A. [Continuing] Yes.—was tucked in partically, and this part here [indicating] was resting against the side, which would normally be laid up here [indicating].

It was as if it was put in like this [demonstrating] and then, because of the weight of the gun, the side of the bag was compressed, so that I could see, even though this part of this carryall [indicating] is sitting up here, this part down here [indicating] is smashed down and I could clearly see the entire gun case.

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Q. [By Mr. Siegel] How much of the gun case in terms of inches was visible to you as you looked at the carryall bag and saw the gun case?

A. Because of the way it was laid down, actually all of it was visible.

Q. After you saw the gun case, what did you do next?

A. Okay. We had already been on a call that involved a gun and, by our knowledge, already knew that there had been a gun drawn on this one scene, and my primary concern at that point is safety.

It was just Officer Fernandez and myself, and Mr. Herring was agitated and walking back and forth sort of pacing, and he headed into the house and Officer Fernandez headed with him.

I saw the gun and I recognized that it was a gun and that it was probably the gun used in the crime.

It was sitting—if this is the driver's seat, there's a console there. It's sitting right back here [demonstrating], is where the case was, and this gun case was sitting right like that [demonstrating].

Q. Was it within easy reach of the driver of a car?

A. Easily reached so, recognizing that this was probably the gun involved in the thing, plus trying to secure a weapon that's out in the open and anybody could grab, I picked up everything and put it and locked it in my [93] police car pending further investigation and then went on to the front door of the house, where I could watch Mr. Herring and Officer Fernandez, to help back up Officer Fernandez in case anything happened, and then could also watch the vehicle and the rest of the scene to secure it as best I could.

Q. When you picked up the carryall case, did anything fall from it?

A. Yes.

Q. What fell from it?

A. A green bag about this big [indicating] that zippers across the top, vinyl plastic.

Q. Where was that green bag contained before it fell out? Do you know?

A. I cannot say exactly where it was positioned in the vinyl bag.

Q. Did you see it fall from within?

A. I saw it fall from — when I grabbed the vinyl bag, I grabbed one handle first and, in doing so, it tipped slowly.

I was doing it in a hurry and I saw the green vinyl bag fall out, but I'm not sure where it was positioned in relation to the gun and everything else in the black vinyl bag.

Q. After you seized the gun in the brown vinyl case, the vinyl case, did you at that time seize the green bag that fell to the floor?

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A. No. I —

Q. You went and locked the carrying case inside of your car. Is that correct?

A. Put it on the front seat of the police car and checked that all four doors were locked.

Q. Then you went inside the house and did further investigation?

A. I actually stood in the front door of the house so that I could watch the front end and the inside.

Q. Did there come a time when you came back to your police car and started doing some paperwork?

A. I came back to my police car when the witnesses — the victims from the incident arrived on the scene in order to have them describe for me the weapon that was involved and then I produced this weapon and asked them if this was the one that was used, had them identify it.

Q. Did you in fact show them that particular gun that is contained in State's Exhibit 1?

A. After they described it to me, yes.

Q. Were they Terry McCall and George Royal?

A. Yes.

Q. Did they both indentify that gun?

A. Yes, positively.

Q. After they identified the gun, what did you next do in relation to either the green bag in the car or this vinyl bag?

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A. I sat down in my police car to run the serial number on the gun and start all the paperwork involved.

Q. When you started doing that, did you notice anything about the vinyl bag that drew your suspicion?

A. I had noticed but I had not followed up on it.

When I was carrying the black vinyl bag, I had noticed that there's two pockets on either side of the vinyl bag. One zippers across the top. One zippers along the side.

As I was carrying it, I noticed sticking out of the side zipper a Ziploc bag with white powder in it.

Q. Were you able to see the white powder in the Ziploc baggie without having to unzip the pocket in which the Ziploc bag was?

A. Yes. All the pockets in the whole bag were unzipped when I picked it up.

Q. Based on your training and experience, did something enter your mind as to what that white powder might be?

A. Based on my experience in the past, I assumed it was cocaine.

Q. Why did you assume? What in your training and experience caused you to believe that was cocaine?

A. Well—

Q. Had you ever seen cocaine before?

A. Yes, many times.

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Q. How many times?

A. Fifty? Many times.

Q. Had you seen it both in the field, on the job and in a controlled situation, as in the police academy?

A. Well, if you include those kind of situations, more times than that, and the most common method that I've seen it in is within a Ziploc bag.

Q. Of the nature that you saw there. Is that correct?

A. Yes.

Q. Did you in fact, after you saw the Ziploc baggie, the corner of it with the powder in it, pull out the Ziploc baggie?

A. Not immediately. I was still concerned with the potential danger of the situation and I knew it wasn't going anywhere and I locked it back in my car.

Q. When you went back to the car, did you extract it?

A. Yes, I did.

Q. Within what was it contained?

A. It was in a large Ziploc bag, larger than this and within the one smaller one, sandwich-size, each of those contained a quantity of cocaine and all those three were rolled up and sort of packed down in the bottom of the bag.

There was also a packet about this big [indicating].

THE COURT: Indicating about two inches?

THE WITNESS: Two to three inches square.

[97]

Q. [By Mr. Siegel] Go ahead.

A. It was sealed like a heat seal on all four sides, completely sealed. It wasn't one that I could open or close, and it also contained a white powder.

Q. Was this white powder submitted to the Public Safety Department Crime Lab?

A. Yes, it was.

Q. Did it in fact prove positive for the test of cocaine?

A. Yes, all of it.

Q. Do you know how much cocaine was involved?

A. Approximately six ounces total.

Q. What was your purpose in going through the vinyl bag after you took it from the defendant's car?

A. For having seen the cocaine in plain sight. That's contraband. Seized the contraband and then had cause to believe that there might be more in the bag.

Q. When did you first notice the Ziploc bag containing the white powder? Was it when you first looked in the car or after you grabbed the vinyl bag, or where was it in the time sequence that you first noticed that corner of the Ziploc bag with that white powder inside?

A. I believe it was right upon removing it from the car.

Q. Right upon removing it from the car?

A. Yes. I picked it up from the car and I saw that; [98] walked to my police car and put it in there.

Q. That was after you had seized the bag because you saw the gun case in the zipper?

A. Right, right.

Q. Did there come a time when you subsequently went back to the green bag which was in the car?

A. Yes.

Q. Where was the green bag when you went to the car?

A. It was lying on the floor in the rear. There's the transmission hump in the middle of the car.

I pulled that big vinyl bag right there. It was laying on the floor sort of laid up against the transmission.

Q. At what point in time relative to finding the cocaine did you go back inside the car to obtain the green bag?

A. After I found the cocaine, I went back to get the green bag.

Q. Why did you go back and get the green bag?

A. I had heard it fall and had not grabbed it at first because it wasn't heavy enough to be a weapon and I'm still at that point in time concerned basically with the weapon part and the safety part of the situation, so I knew it was lightweight and was not a weapon.

After I found the cocaine, I have on many occasions — we have found narcotics in bank bags, specifically more often [99] cocaine than 'ludes or 'ludes and cocaine.

It seems to be a common carryall now to use those bank bags so, combined with the cocaine that I found and my knowledge of that and the fact that it was not heavy when it fell, I thought I had more contraband.

Q. Was that like the bank bag that you were speaking of that you saw before containing the contraband?

A. Yes, many times. Many times. It's very often.

Q. Did everything you testified to take place in Dade County, Florida?

A. Yes, it did.

MR. SIEGEL: Nothing further.

THE COURT: Mr. Snowden?

CROSS EXAMINATION

BY MR. SNOWDEN:

Q. As you approached the Herring residence, was Officer Fernandez already there?

A. I arrived first on the scene in my police vehicle. However, Officer Fernandez reached Mr. Herring first.

Q. Then I am assuming that your arrival, yours and Officer Fernandez' was almost simultaneous?

A. Well, he was around the corner when I arrived. Maybe a half a block to a block behind me.

Q. Were you not working in an undercover capacity that evening?

[100]

A. No, I was not. I was in uniform. We just didn't have enough police cars, so I was in an unmarked police car.

Q. You were in uniform?

A. Full uniform, hair up, everything.

Q. Were you armed?

A. Yes. Riding as a patrol officer.

Q. Was Officer Fernandez armed?

A. Yes.

Q. If you got there before Fernandez, why is it that he approached Herring before you did?

A. I pulled in on the parking on the north side of the house.

Officer Fernandez pulled up almost directly — just past Mr. Herring's car but almost directly behind it. He was closer to Mr. Herring's car.

Q. Then he went on into the house and called for Herring?

A. No. Mr. Herring was — I believe Mr. Herring had walked to the front of his vehicle by the time Officer Fernandez got there.

Q. So Mr. Herring was not in his house when Officer Fernandez first approached him?

A. No. Mr. Herring was standing by the car when he first approached him.

Q. Did you hear the conversation between Officer [101] Fernandez and Mr. Herring?

A. No, I did not. Not the initial one, no.

Q. Did you see Mr. Herring provide Officer Fernandez with a driver's license?

A. I believe so. They were talking and I think he got—I'm not sure if he got in his wallet. I know he handed him something.

I was more concerned with the rest of the scene than—

Q. I did not hear you. I am sorry.

A. I was more concerned with the car, the rest of the scene than with the conversation with Mr. Herring.

Q. Then did Officer Fernandez take Mr. Herring to the house?

A. They walked into the house, yes.

Q. Into the house?

A. Yes.

Q. Did you go into the house with them?

A. This was right when I saw the gun. I picked up the gun; put it in my car and then I went in with them.

Q. You had to go out of your way to go to the Thunderbird in order to see the gun, did you not?

A. No. The Thunderbird was sitting here [indicating].

When Officer Fernandez and Mr. Herring were talking, they were talking right here [indicating], to the front of the [102] car, about this headlight [indicating], and I was standing behind Mr. Herring because, while Officer Fernandez was talking to Mr. Herring, I was looking to see if he had a concealed gun so, when I stepped over to this car, I initially went to shut the doors and I just took two steps and it was in plain view.

Q. Were both doors open on the Thunderbird?

A. Yes.

Q. Was the trunk open?

A. The trunk was not open when I arrived but, after they went into the house and after I secured the gun back in my car, when I looked up, the trunk was then open.

Q. When you initially approached the Thunderbird for the purpose of closing the door and securing that —

A. Yes. No. Excuse me. I initially approached the Thunderbird because Mr. Herring was there talking to Officer Fernandez. I turned around when the door was open to shut the door.

Q. Right. I thought I understood you to say that you had intended to shut both doors and secure everything in the Thunderbird. Is that right?

A. Intended to?

Q. Yes.

A. You mean when I turned around to shut the door?

Q. Yes. When you went up and when you first saw this [103] thing you identified as a gun. You had planned on actually shutting the door, did you not?

A. No, not to secure the gun in the car, no.

Q. What had you planned to do?

A. I had planned on shutting the door to secure the car. This was before I saw the gun.

Q. That is —

A. All right? I'm misunderstanding —

Q. At that point, you had seen Howard Herring and there was no evidence of possessing a weapon on his person?

A. No obvious evidence. He still could have.

Q. Did you go into the house and search the house?

A. No, I did not search the house.

Q. When you were in the T-Bird, was there not luggage and ladies' pocketbooks and other things inside the car?

A. I believe there were two ladies' pocketbooks in the car.

Q. Was not Howard Herring on the telephone inside the house talking to somebody while you and Officer Fernandez were waiting for him?

A. That was after, a little bit later.

We went inside in the house and Mr. Herring—actually, the phone rang once. I know that. He answered the phone once and I believe he also made a phone call.

Q. So far practical purposes, all the time you were [104] there, Officer Fernandez had Mr. Herring in custody?

A. No. He was free to walk back and forth through his house, which he did.

Q. When you saw that gun case in the back seat of his car, you were not fearful that he was going to get that gun case?

A. Not after I locked it in my police car.

Q. I mean when you saw it.

A. Knowing that Mr. Herring—I though it entirely likely that he would pull the gun again.

Q. So you reached inside the car and pulled out the gun case?

A. Yes. Pulled out the case containing the gun.

Q. You pulled the carryall containing the gun?

A. Well, the gun was in the carryall, yes.

Q. You made particularly guarded efforts in pulling that carryall out so the gun would not drop. Is that right?

A. No. Actually, I almost dropped it when I pulled it out, when I grabbed the carryall.

I grabbed the carryall by one handle first and it tilted. That's why the bank bag fell out.

Q. Would it not have been safer, then, to just take the gun case out?

A. It was in the carryall, for all intents and purposes.

Q. So then you were not fearful of it being [105] accidentally discharged if it dropped?

A. No. It was basically secured in a case and that type of a weapon, automatically, they don't go off.

Q. So there is no reason, then, why you did not take it out of the gun case instead of the carryall?

A. The gun case was in the carryall. I was securing—

Q. I understand that but, at this point, you say you just saw the gun case and you were retrieving what you thought was a gun.

A. Yes.

Q. I am saying that there was no reason for you to take the whole gun case.

A. Except it was easier for me to carry the carryall because the edge of the carryall was closer to me and I'm trying to reach in a car in a hurry because I wanted to secure that case and get inside.

Q. I did not hear the last answer.

A. I wanted to secure the gun and then get inside to go with Officer Fernandez.

Q. After you secured it in your car, you did then go into the house?

A. Stepped inside.

Q. Because you said it was not going any place?

A. No. It was in my police car.

Q. The T-Bird did not go anyplace, did it?

[106]

A. Yes, but the doors were unlocked.

I didn't lock the door. The windows were down and a loaded gun, which I assumed, was laying in a car.

Q. I understand, but the T-Bird did not go any place, did it?

A. No, the T-Bird didn't go any place.

Q. You did not search any other bags inside the T-Bird?

A. No.

Q. After you took the carryall, You went back to the T-Bird and got the bank bag?

A. Later, yes.

Q. Later?

A. Yes.

Q. When you went back later, you did not check any of the other bags or pocketbooks in the T-Bird?

A. I moved them around but I didn't—

Q. Did you move them around and feel them for their contents?

A. I wouldn't have any cause to go into a purse that was laying there. Any purse I find—

Q. As of this time, you had formulated an opinion that the carryall contained cocaine, had you not?

A. Yes, but —

Q. You went back into the car to get the bank bag [107] because it might contain cocaine?

A. Because it was located in the vinyl bag with the gun and with the cocaine. It's an association with them.

Everything else in the car was not, and I would not have probable cause to search, especially a handbag that, obviously, did not belong to Mr. Herring.

Q. You think you had probable cause to take that gun case out?

A. It is —

MR. SEIGEL: Objection. It calls for a legal conclusion.

THE COURT: She has already answered.

Q. [By Mr. Snowden] Were you and Officer Fernandez present when he placed Howard Herring under arrest?

A. I was within basic earshot but cannot quote to every word.

Q. Did you hear any conversation between them before he placed him under arrest?

A. All I heard was that Officer Polink read him his rights and Mr. Herring refused to say anything.

Q. Officer Fernandez did not read him his rights?

A. I'm not sure. It might have been Officer Fernandez. I wasn't looking at them when it happened. I'm not sure.

Q. Was Herring under arrest when Terry McCall and George Royal came on to the scene?

[108]

A. No. He had not been placed under arrest. I did not hear—I did not hear Officer Fernandez say to Mr. Herring, "You are under arrest," prior to—

Q. You saw Officer Fernandez take him out to where McCall and Royal were and ask them if they could identify him, did you not?

A. I'm sorry. I can't—I saw him take him out, yes. I saw them identify him, yes.

I cannot recall right now the sequence when—

Q. All the time that you and Officer Fernandez were on the scene, Howard Herring was in Officer Fernandez' custody, was he not?

A. No. We were still investigating. He was not under arrest until after the witnesses were brought back to the scene to identify him.

Q. He was —

A. We were conducting and investigation. He was a suspect. He had not been arrested.

Q. He was walking freely and Officer Fernandez was no where around?

A. No. We walked around behind him.

We did not stop him from doing anything. We just didn't want him to open a drawer and grab a gun or something like that.

Q. I do not want to be repetitious, but did you hear [109] one of the officers place Howard Herring under arrest that night?

MR. SIEGEL: Objection. Repetitious.

THE COURT: Go ahead and answer the question.

A. I heard one of the officers read Mr. Herring his rights. I heard him state that he was not going to say anything and he wanted to talk to his lawyer, and I heard him say, "You're under arrest."

Q. For what?

A. I did not hear that. There was quite a lengthy conversation after that that I did not hear.

Q. Which officer was that that placed him under arrest?

A. I'm not sure. I wasn't looking at the time.

Q. You do not know whether it was Fernandez or Polink?

A. It was one of the two.

Q. You do not know what he was told he was charged with?

A. No.

Q. You never placed him under arrest?

A. Not at that time, no. I had no charges on him at that time.

Q. Did you later?

A. Yes.

Q. When?

[110]

After I had gone to my car and found the cocaine.

Q. He had already been placed under arrest before you found the cocaine?

A. Yes.

Q. For something else?

A. Yes.

Q. Then did you advise him he was under arrest for possession of cocaine?

A. He was already transported from the scene. I did not speak to Mr. Herring again the rest of the night.

Q. I misunderstood your answer, then. I thought you said you placed him under arrest after you went to your car and found the cocaine.

A. No. After I found the cocaine, he had already been transported and I was still, you know, tied up with paperwork and other stuff.

He had already been transported. I went to the jail after I inventoried all the property and I wrote an additional A form, arrest form for the cocaine charges and the gun charges.

Later on, Mr. Herring was advised of the additional charges, I believe. I was not present at the conversation.

Q. You did not do it yourself?

A. No, I did not.

Q. Did you seek a search warrant for the contents, the [111] rest of the contents of the T-Bird?

A. No.

Q. As a matter of fact, nobody did from the Hialeah Police Department?

A. As far as I know, no.

MR. SNOWDEN: I have no further questions.

MR. SIEGEL: Nothing further, Your Honor.

THE COURT: Thank you.

[Witness excused.]

THE COURT: Do you have any other witnesses?

MR. SIEGEL: No, Your Honor. That is the State's case.

THE COURT: Are you resting?

MR. SIEGEL: Yes, sir.

MR. SNOWDEN: We are not going to offer any testimony, Judge.

THE COURT: Do we have any argument that you wish to address to the affidavit at this time, Counsel?

MR. SIEGEL: Yes, Judge. Very briefly, we will start out with Item No. 1, which I think Ms. Card testified that Mr. Herring never reported to the probation officer.

[136]

After he had been on probation or been put on probation over a year prior to his ultimate arrest, he had never reported and she had no indication that he had

* * *

CERTIFICATE

STATE OF FLORIDA)
) SS:
COUNTY OF DADE)

We, Maria Vila and Peter A. Lyons, CSR, do hereby certify that the case of The State of Florida, Plaintiff, versus Howard Herring, Defendant, pending in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, Nos. 79-8740 and 80-17992, was heard before The Honorable Mario P. Goderich, as Judge, on December 22, 1980 and January 5, 1981; that we were authorized to and did report in shorthand the proceedings and evidence in said case; and that the foregoing pages, numbered 1 to and including 136, constitute a true and correct transcription of our shorthand reports of the proceedings in said case.

IN WITNESS WHEREOF, we have hereunto affixed our hands this 18th day of February, 1981.

/s/ Maria Vila

Maria Vila

/s/ Peter A. Lyons

Peter A. Lyons, CSR

Notary Public, State of Florida
at Large My Commission Expires
Feb. 24, 1983
Bonded by American Fire
& Casualty Company

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT IN
AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

No. 80-17992

STATE OF FLORIDA,

Plaintiff,

vs.

HOWARD HERRING,

Defendant.

Metropolitan Justice Building
Miami, Florida
9:00 a.m., Monday
August 3, 1981

This matter came on for trial before the Honorable
MARIA KORVICK, Circuit Court Judge, and a jury,
pursuant to Notice.

* * *

THEREUPON:

LUANN WILLIAMS

was called as a witness on behalf of the State of Florida
and, having been duly sworn, was examined and testified
as follows:

MR. SNOWDEN: Before this witness testifies, can I have a brief sidebar with the court reporter?

THE COURT: Sure.

(Thereupon, counsel for the respective parties and the court reporter approached the bench and conferred with the court outside the hearing of the jury.)

MR. SNOWDEN: Judge, I have filed a motion to suppress in the case and Judge Goderich ruled he is denying it. I am presuming this witness will attempt to identify the evidence and I will state I am objecting on the same grounds.

THE COURT: And you are asking for a continuing [114] objection which is granted.

MR. SNOWDEN: Yes.

MR. ROBERTSON: Fine.

(Thereupon, the following proceedings were had within the hearing of the jury:)

THE COURT: You may proceed.

DIRECT EXAMINATION

BY MR. ROBERTSON:

Q. Officer, tell us your name and what you do.

A. Luann Williams, police officer, City of Hialeah police.

Q. How long so employed with the City of Hialeah?

A. Over three years.

Q. Were you employed with the City of Hialeah and on duty on September 22nd, 1980?

A. Yes.

Q. At approximately 8:00 at night did you receive a call?

A. Another officer received the call and I drove by the scene to back him up.

Q. What was the scene?

A. It was an accident, hit-and-run.

Q. Did you go to that point?

A. I drove past there. There was already two officers on the scene so I began looking for the vehicle.

[115]

Q. How did you know to look for the vehicle?

A. Officer Pauling advised on the air the description of the subject, the description of the vehicle that had been in the hit-and-run and there was an agg assault involving a firearm.

Q. Did he give you a license number also?

A. Yes.

Q. Was there any other information that came over the radio at a later time?

A. Within a few minutes later the dispatcher advised that the tag on the subject vehicle was registered to Mr. Howard Herring and they gave the address which is an address in Hialeah.

Q. Did you go there?

A. Yes.

Q. Would you describe what you saw when you first got to that address?

A. I was in an unmarked police car, in uniform. I pulled up to the house, next to Mr. Herring's house and as I pulled up the subject vehicle was parked in the driveway of Mr. Herring's home. Both driver and passenger door were open and as I arrived Mr. Herring was standing up at the driver's door and I saw his head.

Q. Were there other officers on the scene at that time?

[116]

A. No.

Q. Did any other officer arrive?

A. Immediately after that Officer Fernandez arrived and he pulled up in front.

Q. He was directly in front?

A. I believe he was just past the car, past the driveway.

Q. How far away were you from where Officer Fernandez parked?

A. About 100 feet or so.

Q. And you were in an unmarked car?

A. Yes.

Q. If you would, describe what happened after that?

A. Both Officer Fernandez and I got out of the car. Officer Fernandez walked up to Mr. Herring, who moved to the front of the car. I come up along the passenger's side and was standing on the passenger's side, between me and Mr. Herring and Officer Fernandez.

Q. Did Mr. Herring eventually go inside the house?

A. Within about a minute from there he walked into the house.

Q. Where did Officer Fernandez go?

A. In.

[117]

Q. What did you do?

A. I turned and when Officer Fernandez was walking to Mr. Herring's house I turned and looked at the car. The dome light was on because the door was open and in the center of the back seat, directly behind the console, there was a brown vinyl carry-all and laying partially in or on top was a gun case. It is a triangular shape, zippered. It was not closed and I could see the butt of a gun.

Q. Let me show you what was marked as State 1A composite for identification.

Can you identify it?

A. Yes. This is the weapon that was in the car that night (indicating) and this is the case it was in (indicating).

Q. Is that the weapon in the case you observed sitting in the automobile?

A. Yes.

Q. Did you impound that?

A. Yes.

Q. Is it in substantially the same condition as it was on that night?

A. Without taking the clip out. It was loaded. I assume that it is unloaded now.

Q. Open it and check.

[118]

A. It is unloaded.

Q. Will you also check the chamber, please?

A. Yes, sir. It is unloaded.

Q. Is it the same condition when you saw it with the exception of being unloaded?

A. Yes.

MR. ROBERTSON: Your Honor, I would move State Exhibit 1A composite into evidence.

MR. SNOWDEN: Sidebar, Please.

(Thereupon, counsel for the respective parties and the court reporter approached the bench and conferred with the court outside the hearing of the jury:)

MR. SNOWDEN: If it is being moved into evidence, the court recognizes my continuing objection and I also object on the grounds of chain of custody not being shown and its connection with the defendant not being shown.

THE COURT: Objection is overruled. So admitted.

(Thereupon, the following proceedings were had within the hearing of the jury:)

THE CLERK: State Exhibit 1A composite for identification becomes State's Exhibit Number 1.

Q. (Mr. Robertson) Officer, after you saw that gun sitting in the case in the back of the car what did [119] you do?

A. At the time Mr. Herring was walking into the house with Mr. Fernandez, Officer Fernandez. I knew that there was a gun involved in this situation and I was afraid for Officer Fernandez' safety in the house.

I also wanted to secure the gun in evidence for the agg assault that happened to the victims so I picked up the case, carry-all case with the gun.

Q. It was contained in there?

A. Yes. I walked to my car and put it on the front seat of my car and locked my police car.

MR. ROBERTSON: Please mark this.

THE CLERK: State composite 1B for identification.

Q. (Mr. Robertson) Officer, I show you what was marked State's Exhibit 1B composite for identification which I removed from a bag marked 8053763 with number B102-2 with invoice 10296.

Can you identify that?

A. This is the property I impounded where I found the gun that night (indicating).

Q. Did you in fact impound that?

A. Yes.

Q. Did you place it inside that bag?

A. Yes.

[120]

Q. Prior to today had that bag been opened before other than your sealing it?

A. At one time I opened it and resealed it.

Q. When?

A. When I brought it to the court in December for the probation hearing. The bag that was placed in was ripped.

Q. Did you take the contents from the other bag and place them into this (indicating) bag?

A. Yes, I did

Q. Were they in your care and control during the time they were outside of the bag?

A. Yes.

Q. Are they in substantially the same condition they were on the date in question?

A. Yes.

Q. Describe the items that are contained in there.

A. I have an address book.

Q. Where did you find that?

A. The address book was in this pocket here (indicating).

Q. One of the side pockets?

A. Yes. I believe in the pocket here (indicating) and zippered like this.

[121]

There is a green pen. It was tucked here (indicating) and there was a bottle of suntan lotion and it was here. There was this bag (indicating) which was full, a bank bag that was full and when I picked it up it fell onto the floor.

Q. It is the one you saw containing the gun?

A. Yes.

MR. ROBERTSON: At this time I move State's composite 1B into evidence.

MR. SNOWDEN: Judge, I make the same objection as we made to State Exhibit A.

THE COURT: Overruled. So admitted.

THE CLERK: State Exhibit 1B composite for identification becomes State Exhibit Number 2.

Q. (Mr. Robertson) Officer, I believe you described that you removed the black bag from your automobile?

A. Yes.

Q. What happened as you were removing it?

A. As I picked it up, it was in the back seat, and I was leading in to it without moving the front seat forward. As I grabbed it, that green bank bag fell out onto the floor but I could tell by the weight as it fell there was not a weapon in it, another gun.

Q. Is that the green bag?

A. Yes. I left it there.

[122]

Q. What did you do with the black bag?

A. I put it on the front seat of my police car.

Q. What did you do next?

A. Locked my car.

Q. Did you ever go in to assist Officer Fernandez?

A. I went to the subject vehicle and I shut the doors on it and then I walked to the front door of the house. The door was open and I stood in the doorway where I watched the subject and Officer Fernandez, to see that Officer Fernandez was never in danger, but I

can also watch the cars so none of the evidence was tampered with.

Q. Did there come a time when Mr. McCall and Royal were brought to the scene?

A. Yes.

Q. To the house?

A. Approximately five, ten minutes after we arrived.

Q. Did you have an opportunity to talk with these two?

A. Both of them, yes.

Q. With respect to State Exhibit 1 in evidence, did you ever show this gun (indicating) to those two people?

A. Yes, after they described it to me.

[123]

Q. Will you describe what you went through with the two victims before showing the gun?

A. The gun was locked in my car. I had them describe for me the best they can what the gun Mr. Herring used looked like. They did not know the difference between an automatic, which this is, and a revolver like my service revolver so I took mine out so they can see the difference.

They said it was not like my service revolver. My service revolver is shiny, chrome-like and they say it was black and they described the barrel, long and slender.

After their description I was sure they were describing this weapon so I took the weapon out of the car and showed it to them and asked if that was the gun that Mr. Herring pointed at them and they both said it was, yes, it was.

Q. Did you ever have an opportunity to look inside of this green bag?

A. Yes.

Q. What did you discover?

A. \$23,123 in cash.

MR. SNOWDEN: Sidebar, please.

(Thereupon, counsel for the respective parties and the court reporter approached the bench and conferred [124] with the court outside the hearing of the jury:)

MR. SNOWDEN: I move for a mistrial. This has come out. This is done for no purpose but just to prejudice the jury.

THE COURT: You mean the money?

MR. SNOWDEN: Yes. The money as brought up before, not relevant to any of the charges and it could

be brought out for the purpose of prejudicing the jury, which it did.

THE COURT: Is one of the charges trafficking?

MR. SNOWDEN: But there is no charge of sale.

MR. ROBERTSON: There is possession with intent to distribute, sell, so the fact we did not catch them selling, the money and the drugs —

MR. SNOWDEN: This matter was brought before Judge Goderich and raised the same objection and he ruled with me, return the money to me and therefore —

THE COURT: Bring the official court record, Matt.

MR. ROBERTSON: He said he would not release it because he does not have jurisdiction.

THE COURT: Has it been a motion in limine as to this testimony?

MR. ROBERTSON: All motions were denied.

MR. SNOWDEN: That is not true. The motion was [125] granted.

THE COURT: Mr. Snowden's motion for return of property is one thing. Was there a motion in limine to exclude testimony? The official record does not have it.

MR. SNOWDEN: However, this was blurted out before I had a chance to object.

THE COURT: Overruled. Let's proceed.

MR. SNOWDEN: Excuse me, one more thing in sidebar. I will then ask, since the court denied the motion, that any further testimony relating to the money is excluded.

THE COURT: Any other testimony?

MR. ROBERTSON: I was going to ask if she counted it. I can skip that.

THE COURT: All right. Let's go.

(The following proceedings were had within the hearing of the jury:)

Q. (Mr. Robertson) Officer, did you ever have an opportunity to, after securing the black bag in your car, to look inside the black bag?

A. Yes, I did.

Q. Besides the items that you already said, anything else inside the bag?

A. Yes, sir. As I put the black bag in my car, [126] I noticed there was the corner of a plastic bag, plastic baggie sticking out of the side pocket of the black bag with white powder in it. I did not open it but I was concerned about backing up Officer Fernandez, so I locked it in my car.

I later went back and opened up that side pocket and discovered the contents of this envelope.

MR. ROBERTSON: Mark this.

THE CLERK: State Composite 1C for identification.

Q. (Mr. Robertson) Describe what you found.

A. One large zip-loc baggie about this size. (Indicating). In the bottom of it were three sandwich type zip-locs and with a white powder and there was one particular packet all sealed, all contained a white powder substance.

Q. I show you what was marked State Exhibit 1C composite for identification purposes.

Can you identify that?

A. This (indicating) should be the contents that I impounded.

Q. Can you identify that bag?

A. Not this bag. I did not seal this (indicating).

Q. If you would, what is the outside of that say?

[127]

A. I.G. Demarzo, the lab technician that analyzed it.

Q. Open that bag.

A. Yes, sir.

Q. Can you identify the contents?

A. Yes, I can. This is the large plastic baggie that they were in. These (indicating) are the smaller baggies and with the white powder in them.

Q. Is that the same powder that was contained in the baggies as you saw them?

A. Yes. Three of them were this almost manila colored powder sticking together.

Q. In your experience as an officer have you had an opportunity to see items like that?

A. Yes.

Q. Approximately how many occasions, if you recall?

A. 40 or 50.

Q. On these prior occasions have the substances been analyzed?

A. Yes.

Q. What did they turn out to be?

A. Cocaine.

Q. In your experience when you saw these, what did you believe them to be?

[128]

A. Cocaine.

MR. ROBERTSON: Judge, can we have a short sidebar?

THE COURT: All right.

(Thereupon, counsel for the respective parties and the court reporter approached the bench and conferred with the court outside the hearing of the jury:)

MR. ROBERTSON: I want to make sure there is no objection to putting in this instead of asking her.

MR. SNOWDEN: We stipulated this. I would like to have a copy.

MR. ROBERTSON: All right. Do you have an objection introducing it through her?

MR. SNOWDEN: You can do that through the stipulation.

THE COURT: One way or another.

You don't need a sidebar. You need a copy. We will make one.

MR. SNOWDEN: There is a few things. I assume that State's Exhibit 1B was going to contain that cocaine as it has in the past so therefore I would like another basis for my objection to Exhibit 1B as not being pertinent and relevant to any of the [129] charges here and prejudicial.

THE COURT: Overruled.

MR. SNOWDEN: While we are here, this morning Mr. Robertson was to provide me with the computer printout on McCall.

MR. ROBERTSON: I was in a hearing until 9:30 and this morning I started at 8:30. I was not getting to the computer. I will bring them in when we break. I did talk to the witnesses and neither was convicted and neither has been convicted of anything involving moral turpitude. They have a trespassing charge.

MR. SNOWDEN: That will be satisfactory.

(Thereupon, the following proceedings were had within the hearing of the jury.)

THE COURT: I believe we need scotch tape on one of the bags. You may proceed.

MR. ROBERTSON: Would you mark this (indicating) for me?

THE CLERK: State Exhibit 1D for identification.

Q. (Mr. Robertson) Let me show you what was marked as State Exhibit 1D for identification.

Can you identify that?

A. The lab report from the Dade County Public Safety Department crime lab.

[130]

Q. With respect to this case?

A. Yes, sir.

It is the report on these items that I impounded and sent to the lab.

Q. What does that report indicate?

A. It indicates that each of the four bags contained powder containing cocaine.

Q. And does it also give weights?

A. Yes.

Q. What are the weights?

A. 64.1 grams, 43.9 grams, 38.0 grams and 28.0.

MR. ROBERTSON: At this time I move 1C and D into evidence.

THE COURT: So admitted.

THE CLERK: State Exhibit 1C composite for identification becomes State Exhibit 3.

State Exhibit 1D for identification becomes State Exhibit Number 4.

Q. (Mr. Robertson) Officer, in your experience as an officer, have you come to know the street value of cocaine?

A. Yes.

Q. What would be the street value of one gram of cocaine?

A. Approximately 85 to \$140 per gram.

[131]

Q. Officer, do you see the person in court today that was taken, that you identified as Mr. Herring?

A. Yes.

Q. Point to him.

A. Sitting next to Mr. Snowden.

MR. ROBERTSON: Indicating the defendant for the record.

Q. (Mr. Robertson) I believe you were said you were removing the black bag from the back of the automobile?

A. Yes.

MR. ROBERTSON: No further questions of this witness.

THE COURT: Cross examination.

MR. SNOWDEN: May it please the court, Mr. Robertson.

CROSS EXAMINATION

BY MR. SNOWDEN:

Q. Officer Williams, do you have the address of the location where you found the T-Bird and Mr. Herring?

A. 2674 West 9th Court.

Q. Hialeah?

A. Yes.

Q. That's where you proceeded after you got the rundown on the tag from the radio?

A. Yes.

[132]

Q. You were in uniform, were you not?

A. Yes.

Q. With your hair up?

A. Yes.

Q. And in an unmarked car?

A. Yes.

Q. And you proceeded to the scene and Officer Fernandez was there at the time?

A. No. I arrived first.

Q. Did you see him check out the T-Bird for damage?

A. Not that I recall but I was not watching Officer Fernandez. I was backing him up which means picking up other things.

Q. Did you check for damage?

A. Yes.

Q. Where was the the damage?

A. It was on the passenger door, like a scrape.

Q. Where was Officer Fernandez when you checked the car for damage?

A. Talking to Mr. Herring.

Q. Inside the house?

A. No, as I walked up to the car originally I saw the damage on the right side.

Q. So Fernandez was talking to Herring outside of the [133] house?

A. Yes, for a brief minute.

Q. Did Fernandez go back to the T-Bird and check for damage after that?

A. Later on, yes, I believe so.

Q. Later on?

A. I believe so. I'm not sure. I did not watch Officer Fernandez that time.

Q. You saw him go into the house with Herring, did you?

A. I saw Mr. Herring walk towards the house and Officer Fernandez following him.

Q. Did they both go in?

A. I did not see because that's when I picked up the gun and everything and put it in the car.

Q. Then after you had secured the gun they were in the house?

A. Right.

Q. In fact Herring did not come out of the house until after McCall and Royal had arrived at the scene?

A. As far as I recall, yes.

Q. And McCall and Royal were shown Herring's driver's license?

A. I was not present for that.

Q. You were not?

[134]

A. No.

Q. You're not denying it happened?

A. No, I was not present.

Q. You did not see it?

A. I did not see it.

Q. Was Herring physically brought to McCall and Royal?

A. I did not see him brought up to him, no.

Q. Did you see Herring taken to the police vehicle and handcuffed into the vehicle?

A. I saw him taken from the house through the front door and that is the last I saw of him. I was aware later he was in the back of a police car but I did not see anything after he was led out of the front door.

Q. What did you see when you first got there?

A. I saw the Lincoln parked in a driveway in front of the house. Both driver and passenger door were open. I saw a person, later recognized as Mr. Herring, standing where the door was open, the driver's door, leaning over.

As I pulled up he stood up and I saw Mr. Herring's face sort of like over the top of the car. I was approaching from the passenger side so I saw him stand up as if he got out of the car.

[135]

Q. How long were you there before Officer Fernandez got there?

A. Long enough to put my car in gear and shut it off and open the door.

Q. Matter of seconds?

A. Half a minute. I was not in any hurry. It is to my advantage to sit and watch in an unmarked car.

Q. As you approached the T-Bird you approached from the passenger's side?

A. Yes.

Q. Did you look for damage or did you see it without looking for it?

A. I was aware it was a hit-and-run, and I saw it.

Q. Were you looking for it?

A. No.

Q. And the door you say was open on that side?

A. Yes.

Q. Had you already, more or less, scrutinized Herring to see if he had weapons on his person?

A. I was approaching cautiously. He was on the driver's side of the vehicle and Officer Fernandez was approaching from the driver's side so he had a clear view.

I'm sure with his training he looked to see.

Q. I'm asking you what you did.

[136]

A. I was watching.

Q. Were you sensitive for the presence of a weapon?

A. Yes.

Q. You were looking for one?

A. Yes.

Q. And you looked inside the car and saw that bag, did you not?

A. I looked inside the car and saw the gun.

Q. In the bag?

A. Yes.

Q. Were the lights on in the car?

A. Yes, the dome light was on in the car.

Q. Were you aware Officer Fernandez inspected the car before you looked at it?

A. No, I was not.

Q. What other people did you see on the scene besides Howard Herring?

A. Outside in the yard, no one else.

Q. No one else?

A. Outside in the yard, no one else.

Q. Were there a male and two females?

A. They were in the house when I arrived.

Q. You found purses in the car, did you not?

A. Yes, there were purses in the car.

[137]

Q. Did you do anything with them?

A. No.

Q. Did you search them?

A. They were in the front seat, no.

I did not believe that Mr. Herring carried a purse.

Q. Did you have any conversation with either of these females?

A. No, I did not.

Q. Were there any other suitcases or anything else in the car?

A. Not that I recall, no.

Q. Any bags in the back seat or the trunk of the car?

A. I did not look in the trunk of the car.

Q. Did you ask the girls anything about what they were doing there?

A. No.

Q. Did you ask the other male what he was doing there?

A. No.

Q. Do you know who owned that gun?

A. Pardon?

Q. Do you know who owns that gun?

A. I know who it is registered to and I spoke with [138] the registered owner.

Q. It is not registered to Howard, is it?

A. No.

Q. Did you dust it for fingerprints?

A. No, I did not.

Q. Did you have it done?

A. No.

Q. Any of the exhibits that you took from the car, did you have them dusted for fingerprints?

A. No.

Q. Don't you ordinarily do that?

A. Not always.

Q. Because you already decided whose it was?

MR. ROBERTSON: Objection.

THE COURT: Overruled.

Q. (Mr. Snowden) What kind of weapon do you carry?

A. A revolver.

Q. And you showed them a revolver?

A. They described for me as best they could the gun.

Q. If I understand your testimony on direct you had to show them the difference between a revolver and another pistol?

A. I asked them if it looked like my revolver and they said it did not.

Q. Did you show them what a revolver was?

[139]

A. Yes, I showed them mine.

Q. Did you go get this weapon?

A. After I was satisfied they were describing that gun, yes.

Q. After they said it did not look like yours?

A. After they described it as best they could without knowledge of what a firearm is.

Q. So you went back to yours and got it?

A. Yes.

Q. And is that when you told them where you got the gun?

A. I never told them where until after he identified it.

Q. Then you did?

A. I believe they became aware. I did not tell them but I'm sure they became aware.

Q. Do you think another officer told him that?

A. I believe he was discussing it with someone on the scene. I do not recall who.

Q. Do you think they overheard you tell someone that you got it in the back seat?

A. Yes.

Q. But somehow they got that knowledge?

A. Yes.

MR. SNOWDEN: Excuse me, Judge.

* * *

CERTIFICATE

STATE OF FLORIDA)

COUNTY OF DADE)

I, ALAN HARRIS, Notary Public in and for the State of Florida at Large, hereby certify I reported the proceedings had before the Honorable Maria Korvick, Circuit Court Judge, on August 3, 4 and 6, 1981; the foregoing pages, 1 through 226, is a true copy of my stenographic report.

WITNESS my hand this 25 day of October, 1981.

/s/ Alan Harris

Alan Harris